U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0300 BLA
and 16-0316 BLA

EVELYN L. BRYAN (o/b/o/ and Widow of HOWARD BRYAN) Claimant-Respondent v. CONSOLIDATION COAL COMPANY and self-insured through CONSOL ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/20/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Norman A. Coliane (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2013-BLA-5089 and 2013-BLA-5546) of Administrative Law Judge Steven D. Bell rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The miner's claim, filed on August 11, 2010, and the survivor's claim, filed on April 26, 2012, were consolidated for purposes of decision only.[1]

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with at least forty years of qualifying coal mine employment and found that the evidence established that the miner had a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Further, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that, because the miner was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[3]

On appeal, employer challenges the administrative law judge's award of benefits in both claims. In the miner's claim, employer challenges the administrative law judge's finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), and thus his finding that claimant invoked the Section 411(c)(4) presumption. Employer maintains that the administrative law judge's

[1] Claimant is the widow of the miner, who died on October 14, 2011. Director's Exhibit 21. In addition to her claim for survivor's benefits, claimant is pursuing the miner's claim on behalf of his estate.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment, are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Under Section 422(*l*), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

errors in awarding benefits in the miner's claim necessitate vacating his award of derivative benefits in the survivor's claim. Neither claimant, nor the Director, Office of Workers' Compensation Programs, filed a response brief.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Miner's Claim

Employer argues that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Employer specifically argues that the administrative law judge erred in his analysis of the blood gas studies and medical opinions in determining that total disability was established pursuant to 20 C.F.R.§718.204(b)(2).

After noting that the only pulmonary function study of record produced non-qualifying values,[6] the administrative law judge considered the results of the only blood gas study of record, performed on February 23, 2011. Decision and Order at 12-14. The administrative law judge correctly found that although the study produced non-qualifying values at rest, it produced qualifying values during exercise. Decision and Order at 13; Director's Exhibit 10. Because he determined that the qualifying exercise study results were both reliable and more probative than the resting study results, the administrative law judge found that the February 23, 2011 exercise blood gas study supported the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least forty years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] A "qualifying" pulmonary function or arterial blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Employer contends that the administrative law judge erred in rejecting Dr. Renn's un-contradicted opinion that the exercise blood gas study results are not "reliably accurate." Director's Exhibit 18; Employer's Brief at 12. We disagree. At the outset we note that Dr. Renn's opinion is contradicted: Dr. Gaziano reviewed and validated the February 23, 2011 blood gas study results on behalf of the Department of Labor. Director's Exhibit 10.

Further, the administrative law judge permissibly rejected Dr. Renn's opinion that the duration of exercise was "insufficient" to yield accurate results because "the total time of exercise was only one and three quarter minutes." Decision and Order at 13; Director's Exhibit 18. In support of his opinion, Dr. Renn stated that "[a]n exercise time of [three to four] minutes is required to correct the known physiologically normal early exercise-induced relative hypoxemia," citing an article published in *Respiratory Environmental Exercise Physiology*. Director's Exhibit 18; *see* Decision and Order at 13. The administrative law judge accurately noted, however, that the regulations do not require that exercise be performed for a threshold duration before exercise study results can be substantiated. Decision and Order at 13. Moreover, the administrative law judge reasonably found that Dr. Renn failed to explain how qualifying blood gas values are a normal, predictable physiological response to less than one minute and forty-five seconds of exercise. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 13. In light of these factors, the administrative law judge permissibly determined that Dr. Renn's opinion that three to four minutes of exercise is "required" and that the miner's oxygenation would improve with longer exercise was inadequately explained. Decision and Order at 13-14; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

As the administrative law judge permissibly discredited the opinion of Dr. Renn regarding the validity of the exercise blood gas study, we affirm the administrative law judge's finding that the exercise blood gas study results are reliable. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR 2-103; *Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987) (the party challenging an objective study must demonstrate how the defect renders the study unreliable); Decision and Order at 14. We further affirm the administrative law judge's permissible determination that because exercise testing is a better predictor of a claimant's ability to work in the mines, the qualifying exercise blood gas study is entitled to greater weight than the non-qualifying resting study.[7] *See Coen v.*

[7] The administrative law judge found that claimant's job duties as an oiler and furnace operator included checking oils in all the crushers, greasing all bearings, unloading railroad cars, and checking belts and rollers. Decision and Order at 10;

Director, OWCP, 7 BLR 1-30, 1-31-32 (1984) (it is within the administrative law judge's discretion to find a particular study more probative than another study, but the administrative law judge must provide a rationale for according greater probative value to the results of one study over those of another); *Sturnick v. Consolidation Coal Co*., 2 BLR 1-972, 1-977 (1980) (an administrative law judge may find total disability established based on either resting or exercise blood gas studies but must state his rationale for relying on one set of values over the other); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 13. We therefore affirm the administrative law judge's finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

As the administrative law judge noted, a claimant may establish total disability using just one of the four types of evidence at 20 C.F.R. §718.204(b)(2) "[i]n the absence of contrary probative evidence[.]" 20 C.F.R. §718.204(b)(2); Decision and Order at 14. After permissibly determining that the pulmonary function study did not undermine the blood gas studies because they measure a different form of impairment, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.* 6 BLR 1-797, 1-798 (1984), the administrative law judge reviewed the medical opinions of Drs. Renn and Rosenberg that the miner retained the respiratory capacity to perform his usual coal mine employment, pursuant to 20 C.F.R. §718.204(b)(2)(iv).[8] Decision and Order at 14.

Director's Exhibit 4. His duties also required him to use general tools, a grease gun, and sledge hammers. *Id.* The miner described his work as requiring standing for eight hours, and lifting and carrying fifty to one hundred pounds. Director's Exhibit 4.

[8] The administrative law judge also considered the opinion of Dr. Saludes, who examined the miner on behalf of the Department of Labor. In his initial report, Dr. Saludes opined that the miner lacked the capacity to perform his usual coal mine work based on his reduced FEV1/FVC ratio, his exercise induced hypoxemia, and his age. Decision and Order at 16; Director's Exhibit 10. In an addendum, however, Dr. Saludes opined that because the miner's FEV1 value was relatively well maintained, he did not appear to be totally disabled by his lung function alone. *Id.* Finally, in a second addendum Dr. Saludes again revised his opinion, concluding that the miner lacked the pulmonary capacity to perform his usual coal mine work. *Id.* The administrative law judge discredited Dr. Salude's report as being confusing, internally inconsistent, and inadequately explained. Decision and Order at 16-17. The administrative law judge therefore found that it did not undermine the qualifying blood gas study evidence because

The administrative law judge permissibly discounted Dr. Renn's opinion[9] as based, in part, on his incorrect conclusion that the qualifying exercise blood gas study results are unreliable. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). The administrative law judge further rationally found that the remaining bases for Dr. Renn's opinion – the pulmonary function study and resting blood gas study results – do not constitute probative evidence that the gas exchange impairment demonstrated with exercise is not disabling. *See Martin*, 400 F.3d at 307, 23 BLR at 2-285-87; *Tussey*, 982 F.2d at 1040-41, 17 BLR at 2-22; *Sheranko*, 6 BLR at 1-798. Thus the administrative law judge permissibly found that Dr. Renn's opinion is "unreasoned" and entitled to "diminished weight," and therefore does not constitute contrary probative evidence that would outweigh the qualifying blood gas study. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR 2-103; Decision and Order at 15-16.

The administrative law judge also considered Dr. Rosenberg's opinion that the miner did not have a totally disabling respiratory impairment. Dr. Rosenberg opined that the miner's blood gas studies reflected "some hypoxemia with exercise," but added that while "[the miner's] PO2 fell somewhat, taking into account his age, it did not fall to qualifying levels." Employer's Exhibit 3; *see* Decision and Order at 13. Dr. Rosenberg further stated that "any fall in [the miner's] PO2 [was] likely related to his underlying ischemic heart disease." Employer's Exhibit 3; Decision and Order at 14.

The administrative law judge noted that in opining that the miner's qualifying exercise blood gas studies are essentially normal for a man of his age, Dr. Rosenberg explained that "the qualifying tables set up by the [Department of Labor] are only applicable up until age [seventy-one] years" and that "[the miner] was [eighty-three] years of age when Dr. Saludes' exercise [blood gas] test was performed." Employer's Exhibit 3; *see* Decision and Order at 15. In finding Dr. Rosenberg's opinion to be unpersuasive, the administrative law judge correctly noted that Dr. Rosenberg appears to have confused the pulmonary function study tables with those set forth for arterial blood gas studies, which make no reference to age. Decision and Order at 15; *see* 20 C.F.R.

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of its lack of probative value. *Id.* at 17. As this finding is unchallenged on appeal, it is affirmed. *Skrack*, 6 BLR at 1-711.

[9] In a report dated November 16, 2011, based on the mild degree of obstruction reflected by the pulmonary function study and the miner's normal resting blood gas study, Dr. Renn opined that the miner retained the respiratory and pulmonary capacity to perform his coal mining job of oiler and furnace operator. Director's Exhibit 18.

Part 718, Appendix B, C. The administrative law judge further found that even if the miner's qualifying exercise blood gas values are simply a reflection of his age, Dr. Rosenberg failed to explain why the miner's consequent hypoxemia would not cause total respiratory or pulmonary disability.[10] *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000) (non-qualifying objective test values do not preclude a finding of total disability by a physician); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR 2-103; *Clark*, 12 BLR at 1-155; Decision and Order at 15.

The administrative law judge also permissibly found that Dr. Rosenberg's attribution of the fall in PO2 to cardiac disease[11] did not undermine the probative value of the qualifying exercise blood gas study results, because the record did not reflect that the February 23, 2011 arterial blood gas study was obtained during or soon after an acute respiratory or cardiac illness. *See* Appendix C to 20 C.F.R. Part 718; *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-14 (1993); *Temple v. Big Horn Coal Co.*, 14 BLR 1-142, 1-144 (1990); Decision and Order at 15. Moreover, the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether a totally disabling respiratory or pulmonary impairment is, or was, present, regardless of cause. *See* 20 C.F.R. §718.204(b)(1). The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or in consideration of whether an employer has rebutted the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.204(a), (c), 718.305(d)(1)(ii). Thus, contrary to employer's argument, Dr. Rosenberg's attribution of the miner's respiratory impairment to cardiac disease, while relevant to the issue of disability causation, would not in itself contradict the administrative law judge's

[10] Employer correctly asserts that in evaluating Dr. Rosenberg's opinion, the administrative law judge erred in stating that a miner must be found to be totally disabled, without reference to age, if the values specified in one of the tables in Appendix C to Part 718 are met. *See Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (a physician may consider a miner's age in interpreting blood gas study results); Decision and Order at 15; Employer's Brief at 15. However, as the administrative law judge also discounted Dr. Rosenberg's opinion as unpersuasively explained, any error is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[11] Dr. Rosenberg attributed the qualifying results of the February 23, 2011 arterial blood gas study to the miner's ischemic heart disease because "the year after Dr. Saludes' evaluation, [the miner] experienced increasing congestive heart failure in relationship to a high grade [left anterior descending artery] obstruction, having a myocardial infarction." Employer's Exhibit 3. Therefore, Dr. Rosenberg posited, "this high-grade lesion existed for some time prior to [the miner's] death." *Id.*

finding that the blood gas study evidence established total disability. *See* Employer's Brief at 14-15.

The determination of whether a medical opinion is adequately reasoned and documented is for the administrative law judge as the factfinder to decide, *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *Clark*, 12 BLR at 1-155, and the Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). As substantial evidence supports the administrative law judge's credibility determinations pursuant to 20 C.F.R. §718.204(b)(2)(iv), we affirm his findings that the medical evidence, considered as a whole, establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc), and that claimant invoked the Section 411(c)(4) presumption. Decision and Order at 17. We further affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

Having awarded benefits in the miner's claim, the administrative law judge found that claimant established each fact necessary to demonstrate her entitlement under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 26; *see* 30 U.S.C. §932(*l*). As the administrative law judge's findings are supported by substantial evidence, we affirm the administrative law judge's determination that claimant is derivatively entitled to receive survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge